BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. AVISTA CORPORATION, Respondent	DOCKETS UE-240006 & UG-240007 (Consolidated) COMMISSION STAFF'S MOTION FOR LEAVE TO REPLY

I. INTRODUCTION

1 Staff has moved for summary determination concerning Avista's proposed portfolio forecast error adjustment, which it incorporated into its pro forma power cost adjustment and into its Energy Recovery Mechanism (ERM) baseline. Staff argued that the events underlying the portfolio forecast error adjustment are not known or measurable, that Avista did not consider offsetting factors, and that incorporating the error adjustment into the ERM baseline runs contrary to the principles underlying the ERM.

2 Avista, in response, largely sidestepped whether there were material issues of fact on the issues identified by Staff. It instead makes argument concerning the general propriety of summary determination, the need to build a record, the need to apply existing standards differently, and the proper setting of the ERM baseline.

3 The Commission should grant Staff leave to reply. Avista raises a number of process and factual arguments that would benefit from adversarial testing.

II. RELIEF REQUESTED

4 Staff respectfully requests that the Commission grant it leave to file the reply in support of the motion for partial summary determination attached to this motion.

III. STATEMENT OF FACTS

5 In late March, Staff moved for partial summary determination on the issue of Avista's proposed portfolio forecast error adjustment. Staff based its motion on Avista's own prefiled direct testimony and argued that testimony showed that the portfolio forecast error adjustment did not involve known and measurable events and dollar amounts and that Avista had failed to consider offsetting factors.[1] Staff also argued that incorporating the forecast error adjustment into the ERM baseline would produce unfair, unjust, or unreasonable rates.[2]

6 In April, Avista responded to Staff's motion. In its response, Avista argues, in various ways, that summary determination would conflict with the Administrative Procedure Act (APA), claims that it requires a hearing to build the record necessary for a decision in this matter, argues for relaxed application of the existing standards, and claims that certain issues of fact remain.[3]

7 Staff now seeks leave to reply.

IV. STATEMENT OF ISSUES

8 Should the Commission grant Staff leave to reply?

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[1] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Commission Staff's Motion for Partial Summary Determination, 11-16 ¶¶ 22-33 (Mar. 20, 2024).
[2] *Id.* at 16-19 ¶¶ 34-41.
[3] *See generally Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Answer of Avista Corp. to Staff's Motion for Partial Summary Determination (Apr. 9, 2024) ("Response").

V. ARGUMENT

9 Good cause exists to allow Staff leave to reply. The Commission should, accordingly, grant it that leave.

10 Parties may request various forms of Commission action in an adjudication through a motion.[4] One such type of action is a procedural modification, which can change the process or schedule for a proceeding.[5]

11 The Commission's rules for summary determination provide for a response as a matter of right, but not for a reply.[6] Accordingly, Staff requires the Commission's leave to reply.

12 The Commission should grant Staff leave to reply. Avista raised a number of unanticipated procedural arguments,[7] as well as multiple factual claims that do not directly respond to Staff's arguments.[8] Staff thus could not have anticipated these and preempted them with its motion. Staff has diligently filed this motion and its reply, and thus granting Staff leave will not prejudice the Commission, Avista, or any other party.

VII. CONCLUSION

13 Staff requests that the Commission grant it leave to file the reply in support of its motion for partial summary determination submitted as an attachment to this motion.

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[4] WAC 480-07-375(1).
[5] WAC 480-07-375(1)(b).
[6] WAC 480-07-380(2).
[7] *E.g.*, Response at 2 ¶ 5.
[8] *E.g.*, Response at Attachment A.

DATED this 17th day of April, 2024.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

/s/ *Jeff Roberson*, WSBA No. 45550
Senior Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 522-0614
jeff.roberson@atg.wa.gov

ATTACHMENT

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. AVISTA CORPORATION, Respondent	DOCKETS UE-240006 & UG-240007 (Consolidated) COMMISSION STAFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DETERMINATION

I. INTRODUCTION

1 As explained in Staff's motion for summary determination, the prefiled direct testimony of Avista witnesses Kalich, Kinney, and Schultz leave no material issue of fact concerning whether the portfolio forecast error it incorporates into its pro forma power cost adjustment and its Energy Recovery Mechanism (ERM) baseline involves known or measurable events, that Avista considered offsetting factors for the pro forma adjustment, or that incorporating the error into the ERM baseline produces fair, just, reasonable, or sufficient rates. Avista's best chance for avoiding summary determination on each of those issues was to respond and create material issues of fact.

2 The company has failed to do so. That failure is an overt, if tacit, acknowledgment that Staff correctly identified the adjustment as unknown and unmeasurable and unbalanced (due to the failure to consider offsetting factors). It is also an overt, if tacit, acknowledgment that incorporating the error into the ERM baseline arbitrarily biases the baseline and produces rates that are unfair, unjust, or unreasonable. The Commission should grant Staff's motion over the arguments that Avista raises in its response, which largely consist of legally

erroneous arguments, erroneous application of the Commission's standards, and claims about the existence of immaterial questions of fact.

II. ARGUMENT

3 Avista does not, at any point in its response, claim that the events underlying the portfolio forecast error are known and measurable, or that it has considered offsetting factors for those events. There is not material issue of fact, and the Commission should grant Staff's motion. Avista's counterarguments,[1] which concern (1) its right to a hearing, (2) the building of the record, (3) relaxation of the known and measurable standard, (4) offsetting factors to other events, and (5) the proper setting of the ERM baseline, are without merit and the Commission should reject them.

A. Summary Determination Does Not Infringe on Avista's Right to a Hearing or Conflict with the Administrative Procedure Act (APA)

4 Avista first argues that a grant of summary determination would deprive it of its right to be heard and would conflict with the APA's requirement for initial and final orders. The company has it wrong on both counts.

5 Avista roots its right to a hearing in RCW 34.05.449(2), which requires that presiding officers, "to the extent necessary for the full disclosure of all relevant facts and issues, . . . afford . . . to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence." Avista contends that, absent a "rigorous hearing process," it will suffer deprivation of this right. That argument is both theoretically and practically wrong.

[1] *See generally Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Answer of Avista Corporation to Staff's Motion for Partial Summary Determination (Apr. 9, 2024) ("Response").

6 At the theoretical level, Avista implicitly argues that the APA forbids agencies from employing summary proceedings, as any such proceeding would avoid the type of full evidentiary hearing that Avista claims RCW 34.05.449(2) protects. But the Commission must interpret chapter 34.05 RCW to preserve law applicable to the previous versions of the state APA and in harmony with the federal APA.[2] Agencies' power to use summary proceedings was well-established under the prior state APA,[3] and the federal courts have similarly recognized the propriety of summary proceedings under the federal APA.[4] Washington's courts, accordingly, continue to recognize the propriety of agency procedures like the Commission's summary determination, and the Commission should follow their lead.[5]

7 Practically, Avista has enjoyed every right offered by RCW 34.05.449(2). It prefiled testimony from numerous witnesses, had the opportunity to present argument as to Staff's motion for summary determination through its response, and had the chance to rebut Staff's contention that it had failed to prove necessary elements for the pro forma adjustment and change to the Energy Recovery Mechanism (ERM) baseline by submitting evidence to create a material issue of fact with its response (something Staff shall return to later).[6] While it has not cross-examined any Staff witnesses, it had no need to do so to disclose "all

[2] RCW 34.05.001 ("[t]he legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the [APA] in effect before July 1, 1989, shall remain in effect.").
[3] *Asarco Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 695-98, 601 P.2d 501 (1979)
[4] *E.g., Weinberger v. Hynson, Wescott, & Dunning, Inc.*, 412 U.S. 609, 620-21, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973) (approving the FDA's summary judgment procedures); *Fed. Power Comm'n v. Texaco*, 377 U.S. 33, 39, 84 S. Ct. 1105, 12 L. Ed. 2d 112 (1964) (approving the FPC's use of summary proceedings).
[5] *Kettle Range Conservation Group v. Dept. of Natural Res.*, 120 Wn. App. 434, 85 P.3d 894 (2003) ("[t]he APA does not expressly authorize summary judgments, but case law has established that agencies may employ summary proceedings.") (citing Eastlake Cmty. Council v. City of Seattle, 64 Wn. App. 273, 276, 823 P.2d 1132 (1992).
[6] CR 56(c), (e).

relevant facts and issues"[7] related to the portfolio forecast error adjustment – even crediting Avista's testimony as true (for purposes of Staff's motion only), Avista fails to make the showings necessary to incorporate the adjustment into its revenue requirement or to adjust the ERM baseline.

8 Avista also seems to indicate that the public service laws preclude summary determination, citing RCW 80.28.020's use of "after a hearing" for that proposition. That argument proves too much. *Every* APA adjudication, by definition, requires the opportunity for a hearing.[8] Yet, as noted above, both the state and federal courts have determined that agencies may use summary proceedings in adjudications. That recognizes that summary proceedings suffice as the hearing where there is no material issue of fact that would warrant a full evidentiary hearing.[9]

9 Avista also erroneously claims that any grant of summary determination would result in a legally infirm order under RCW 34.05.461(3). As Avista notes, RCW 34.05.461(3) requires agencies to "include a statement of findings and conclusions," with explanations for each, in initial and final orders, but only as to the "material issues of fact, law, or discretion." Avista's argument suffers from two flaws.

10 First, the Commission's final order here will contain numerous findings and conclusions about the *material* issues of fact and law, the ones for which the parties will proceed to hearing. It just will not contain findings or conclusions about the portfolio

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[7] RCW 34.05.449(2).
[8] 34.05.010(1) (defining an "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.").
[9] *See Macomb Pottery v. NLRB*, 376 F.2d 450, 452 (7th Cir. 1967) (federal statute providing the right to appear and provide testimony "cannot logically mean that an evidentiary hearing must be held in a case where there is no material issue of fact), *overruled on other grounds by Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983).

forecast error, and that is not legally problematic because, in granting summary determination, the Commission will have concluded that no material issues of fact exist with regard to that particular adjustment.[10]

11 Second, no reviewing court will look for findings and conclusions related to a grant of summary determination. In fact, a reviewing court would disregard as inappropriate and superfluous any such findings or conclusions.[11] It would instead review the administrative record de novo, and also review de novo under the error of law standard the decision to grant summary determination.[12] There would be no error in this regard, and certainly no prejudice to Avista,[13] if the Commission grants summary determination.

B. Avista Had Multiple Chances to Develop the Record with Regard to the Portfolio Forecast Error; It Has Simply Declined to Take Those Opportunities, and Thus No Material Issue of Fact Exists

12 Avista makes frequent reference to the need to build a record, claiming that it will be deprived of the opportunity to build a record upon the grant of Staff's motion. Those arguments are baffling.

13 At the outset, Staff filed its motion because Avista failed to make a prima facie case in its opening testimony for the inclusion of the portfolio forecast error adjustment into its rates or into the ERM baseline. Avista was the master of that filing, controlling its timing and the data used to support its case.[14] To the extent that the record is incomplete, the fault lies with Avista.

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[10] WAC 480-07-380(2)(a); *Verizon Nw., Inc. v. Emp't Sec. Dept.*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008) (setting out the standard for summary judgment in the administrative context).
[11] *Kries v. WA-SPOK Primary Care*, 190 Wn. App. 98, 362 P.3d 974 (2015).
[12] *City of Seattle v. Am. Healthcare Servs., Inc.*, 13 Wn. App. 2d 838, 850-51, 468 P.3d 637 (2020).
[13] RCW 34.05.570(1)(d).
[14] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-200900, UG-200901, & UE-200894, Order 08 (Sept. 27, 2021).

14 Further, Avista had the opportunity to provide evidence that would create a material issue of fact in response to Staff's motion for summary determination.[15] For reasons known only to it, it passed. By doing so, Avista has compelled the Commission to grant Staff's motion: the failure to respond to a motion for summary determination by creating specific, material issues of fact should result in a grant of the motion, where appropriate.[16] The grant is appropriate here, for the reasons set out in Staff's initial motion.

15 Finally, any attempt by Avista to build the record in rebuttal or via hearing, as the company appears to want to do, can only constitute what the Commission has repeatedly forbidden – the creation of a moving target whereby a movant makes the case it should have made in its opening case after other parties have already responded.[17] The Commission should decline to offer the Company a third bite at the apple.

16 Avista also posits that numerous factual issues remain for hearing.[18] Each of those issues relates generally to Avista's power costs. Staff has not moved for summary determination as to Avista's power costs.[19] Staff has moved for summary determination with

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[15] CR 56(c), (e).

[16] *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) ("[a] nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists"); CR 56(e) ("[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of denials in a pleading, but a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. *If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party*.") (emphasis added); *see* WAC 480-07-380(2)(a) (Commission considers the standards applicable to a motion for summary judgment when ruling on a motion for summary determination).

[17] *E.g.*, *In re Petition of Union Pac. R.R. Co.*, Docket TR-210809 & TR-210814, Order (May 5, 2022); Wash. Utils. & Transp. Comm'n v. PacifiCorp, Docket UE-210402, Order 05, (Nov. 2, 2021); *Wash. Utils. & Transp. Comm'n v. Harbor Water Co.*, Docket U-87-1054-T, 1988 Wash. UTC Lexis 30, *31 (Mar. 21, 1988); cf. Wash. Utils. & Transp. Comm'n v. Avista, Docket UE-160228 & UG-160229, Order 05 (Nov. 22, 2016) (declining to allow a post-response power cost update because it couldn't be properly vetted).

[18] Response at Attachment A.

[19] *See generally Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Commission Staff's Motion for Partial Summary Determination (Mar. 20, 2024) ("Staff's Motion").

regard to Avista's portfolio forecast error,[20] and none of the issues Avista identifies are material to whether that adjustment is known, measurable, or balanced with the consideration of offsetting factors.[21] And, even if they were, Avista's general allegations do not suffice to prevent summary determination.[22]

C. The Portfolio Forecast Error Is Not Known or Measurable

17 Avista contends that "both Staff and the Company agree that test period results of operations should be adjusted . . . to give effect to all 'known and measurable' changes not offset by other factors."[23] Yes, but Avista does not take the next step and explain how the portfolio forecast error involves known and measurable events and dollar amounts under existing Commission precedent– it instead blithely asserts that the known and measurable standard does not really apply to power costs and that the Commission should relax application of the standard.

18 As to the first argument, Avista alleges that "it has been long-established practice to go beyond 'known and measurable' historical data . . . with necessary pro forming adjustments to power supply."[24] Avista offers no citation to authority for that blanket assertion, and, regardless, Staff has already addressed it. The Commission allows pro forma power cost adjustments using modeled, future-looking results because of the analytical rigor involved in the models.[25] Again, Avista is not making a pro forma adjustment based on modeled power costs; it is instead making an adjustment to those modeled results because it finds itself dissatisfied with them. That is exactly the type of adjustment to which the

[20] *E.g.*, Staff's Motion at 6 ¶ 11.
[21] *See* Response at Attachment A.
[22] *Seven Gables Corp.*, 106 Wn.2d at 13; CR 56(e); *see* WAC 480-07-380(2)(a).
[23] Response at 7 ¶ 16.
[24] Response at 9 ¶ 19.
[25] Staff's Motion at 13-14 ¶ 27.

Commission has always applied the known and measurable standards, and it should do no differently here.

19 As for its second claim, Avista argues that the Commission should relax the known and measurable standard for purposes of determining rate year power costs based on the discretion granted it by RCW 80.28.425.[26] But the Commission need not do so. As just noted, the Commission has long allowed future-looking modeled results for power costs, and it need not relax the standard to allow Avista to include in rate-year power costs revenues or expenses that are known and measurable, such as those associated with executed contracts.[27] Put otherwise, the Commission's historic application of the known and measurable standard in the context of power costs is fully consistent with RCW 80.28.425, and the Commission should decline to modify the standard in this context.

D. Avista Failed to Consider Offsetting Factors

20 Avista chides Staff for "fault[ing] Avista for not providing 'offsetting factors' as part of its portfolio forecast error adjustment," claiming that its power cost methodology already incorporates those offsetting factors. Avista is flatly incorrect. Avista's power cost modelling produces offsets for what the company can model. The theory underlying the portfolio forecast error adjustment is that there will be rate year events that the company cannot model and which cause variance from the modelled results. Staff's point is that Avista did not, and cannot, consider offsetting factors, whether direct or indirect, for those events, and Avista's pointing to its modeled results does not answer that criticism.

[26] Response at 8-9 ¶ 18.
[27] *Cf. Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134, UG-090135, & UG-060518, Order 10, 21 ¶ 45 (Dec. 22, 2009).

21 Avista repeatedly indicates that the ERM true up will capture any offsetting factors, obviating it of the need to look at them in the initial setting of rates. That ignores how the ERM operates. If the initial rates Avista charges do not account for offsetting factors, customers will be charged too high a rate. That overpayment runs through the sharing bands, and customers will never be made whole for the overpayment as Avista retains a percentage of the excess.[28]

22 Finally, Avista claims that "Staff 'trips' over its own argument by "forc[ing]" the portfolio forecast error through the deadbands "that are supposed to operate on 'ordinary' fluctuations in power costs."[29] That argument might have force if Avista had not sponsored significant testimony stating that the variance underlying the portfolio forecast error was the new normal,[30] and repeated the claim in its response.[31]

E. Getting "the ERM 'Baseline' Right"[32] Means Rejecting Inclusion of the Portfolio Forecast Error

23 Avista ultimately contends that a hearing is necessary to determine whether the portfolio forecast error adjustment produces fair, just, reasonable, and sufficient results. It does not.

24 Avista first claims that Staff incorrectly argues that the forecast error allows Avista to unfairly shift risk onto its customers. The calculated forecast error does not quantify Avista's unit power costs or sales. It instead represents Avista's attempts to quantify the amount that it is at risk of undercollecting due to future events that it could not and did not model when calculating its power costs. Staff's point was that by adjusting the baseline

[28] *See* Kinney, Exh. SJK-1T at 51:2-12.
[29] Response at 16 ¶ 40 (emphasis in original)
[30] *E.g.*, Kinney, Exh. SJK-1T at 70:15-71:7.
[31] *E.g.*, Response at n.19.
[32] Response at 12, § V.

upward to account for that risk, Avista is biasing the ERM, which was already intended to address the risk of Avista undercollecting on its power costs. Put otherwise, Avista is building risk-insulation into a mechanism meant to insulate Avista from some risk associated with its power costs.

25 Avista also contends that a hearing is necessary to determine whether it has adjusted the ERM baseline "based on 'speculative events' and in an arbitrary fashion." The Commission need not hold a hearing for that purpose, for it need look no further than Avista's opening testimony, which makes clear that Avista cannot identify the events that will produce the portfolio forecast error. The Commission has signaled that it will not adjust the ERM baseline based on unknown and unmeasuable events,[33] which reflects that making such an adjustment is arbitrary. The Commission should simply apply that principle here.

III. CONCLUSION

26 Staff requests that the Commission summarily determine that Avista may not incorporate the portfolio forecast error into its revenue requirement or ERM baseline.

DATED this 17th day of April, 2024.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

/s/ *Jeff Roberson*, WSBA No. 45550
Senior Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 522-0614
jeff.roberson@atg.wa.gov

[33] *See Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-170485, UG-170486, UE-170221 & UG-170222, Order 07, 54 ¶ 158 (Apr. 26, 2018).